CENTRAL INFORMATION COMMISSION

(Room No.315, B-Wing, August Kranti Bhawan, Bhikaji Cama Place, New Delhi 110 066)

Prof. M. Sridhar Acharyulu (Madabhushi Sridhar)

Central Information Commissioner

CIC/RM/A/2014/002083-SA

Y K Mall, Lucknow v. PIO, KVS, Delhi

Important Dates and time taken:

RTI: 19.08.2013	**FAO:** 28.11.2013	**SA**: 02.04.2014
Closed.	**Hearing**: 26.10.2016	**Decided on**: 1.11.2016

Parties Present:

1. Appellant: Absent.

   Public authority: Absent.

FACTS:

2. The appellant is asking information about reasons for giving average comments given in his ACR in 2001 to 2004. The CPIO replied on 10.10.2013 stating there is no evidence available in the ACR file, which was upheld by FAA. The appellant approached the Commission.

Decision :

3. During the period of 2001 to 2004 ACRs were considered confidential and there was no communication of any adverse or average remarks to the concerned employee. The Annual Confidential Reporting system that was in vogue since British rule makes the bosses super powers and subjugates the subordinate officers into slaves totally depending on the mercy of the superior officers. They are also kept in dark about what remarks were made against them. There was no chance of correction or review or appeal.

4. The Annual Confidential Report (ACR) system is an old system started in the 1940s but still used in the public sector organizations of many middle- and

low-income countries (MLICs) such as India, Swaziland (Africa), and Sri Lanka. (McCourt W, Eldridge W. Global human resource management: managing people in developing and transitional countries. Cheltenham: Edward Elgar, UK; 2003, referred in https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC4890281)

5. Literature suggests that the appraisal systems or the ACR in civil services has been found to be ineffective and does not contribute to employees' learning and development as the ACR system has communication gaps with personal biasness and lack of employees' participation. (Stafyarakis M, Eldridge D. HRD and Performance Management, M.Sc., in Human Resource Development Reading 5. IDPM University of Manchester; 2002 quoted in https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC4890281/)

6. The Supreme Court in Vijay Kumar vs. State of Maharashtra & Ors. 1988 (Supp) SCC 674 held that an un-communicated adverse report should not form the foundation to deny the benefits to a government servant when similar benefits are extended to his juniors. The Supreme Court in another case State of Gujarat & Anr. vs. Suryakant Chunilal Shah 1999 (1) SCC 529 stated:

> Purpose of adverse entries is primarily to forewarn the government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance.

7. Supreme Court in Dev Dutt v Union of India and others (2008)8 SCC 725 (https://indiankanoon.org /doc/801705/) held: "In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved". The two-judge bench speaking through Justice Markandeya Katju, held as follows:

> According to the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

8. The Supreme Court explained how the ACRs and non-communication of same to the affected party will reflect arbitrariness, as follows:

> It has been held in Maneka Gandhi vs. Union of India & Anr. AIR 1978 SC 597 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. vs. Yamuna Shankar Misra 1997 (4) SCC
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> Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

9. Apex court established a norm that every remark, good or bad, in annual confidential report should be communicated to the concerned employee. It explained:

> 14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a `good' or `average' or `fair' entry certainly has less chances of being selected than a person having a `very good' or `outstanding' entry.

10. When the adverse remarks or less than 'best' appreciation will affect the career of the employee, the natural justice demands the disclosure and review mechanism. It is an important transparency measure which will totally transform the relationship between superiors and the subordinate employees. The apex court explained how this non-disclosure affects natural justice:

> 26. What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarized in one word : fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context.
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> 27. Lord Esher M.R. in Voinet vs. Barrett (1885) 55 L.J. QB 39, 39 observed: "Natural justice is the natural sense of what is right and wrong."

28. In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the 'good' entry to the appellant since he was thereby deprived of the right to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.

29. A large number of decisions of this Court have discussed the principles of natural justice and it is not necessary for us to go into all of them here. However, we may consider a few.

30. Thus, in A. K. Kraipak & Ors. vs. Union of India & Ors. AIR 1970 SC 150, a Constitution Bench of this Court held :

> "The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (Nemo debet csse judex propria causa), and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice".

11. Every administrative act should be in accordance with natural justice, as the Supreme Court analysed:

31. The aforesaid decision was followed by this Court in K. I. Shephard & Ors. vs. Union of India & Ors. AIR 1988 SC 686 (vide paras 12-15). It was held in this decision that even administrative acts have to be in accordance with natural justice if they have civil consequences. It was also held that natural justice has various facets and acting fairly is one of them.

32. In Kumaon Mandal Vikas Nigam Ltd. vs. Girja Shankar Pant AIR 2001 SC 24, this Court held (vide para 2):

The doctrine (natural justice) is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action".

33. In the same decision it was also held following the decision of Tucker, LJ in Russell vs. Duke of Norfolk (1949) 1 All ER 109:

> "The requirement of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject- matter that is being dealt with, and so forth".

34. In Union of India etc. vs. Tulsiram Patel etc. AIR 1985 SC 1416 (vide para 97) a Constitution Bench of this Court referred to with approval the following observations of Ormond, L.J. in Norwest Holst Ltd. vs. Secretary of State for Trade (1978) 1, Ch. 201 :

"The House of Lords and this court have repeatedly emphasized that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case".

Thus, it is well settled that the rules of natural justice are flexible. The question to be asked in every case to determine whether the rules of natural justice have been violated is : have the authorities acted fairly?

12. Fair play is the soul of natural justice rule.

35. In Swadesh Cotton Mills etc. vs. Union of India etc. AIR 1981 SC 818, this Court following the decision in Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner & Ors. AIR 1978 SC 851 held that the soul of the rule (natural justice) is fair play in action.

36. In our opinion, fair play required that the respondent should have communicated the 'good' entry of 1993-94 to the appellant so that he could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non-communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative of natural justice.

37. Originally there were said to be only two principles of natural justice : (1) the rule against bias and (2) the right to be heard (audi alteram partem). However, subsequently, as noted in A.K. Kraipak's case (supra) and K.L. Shephard's case (supra), some more rules came to be added to the rules of natural justice, e.g. the requirement to give reasons vide S.N. Mukherji vs. Union of IndiaAIR 1990 SC 1984. In Maneka Gandhi vs. Union of India (supra) (vide paragraphs 56 to 61) it was held that natural justice is part of Article 14 of the Constitution.

38. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the Court to develop new principles of natural justice in appropriate cases.

13. Transparency in public administration requires all entries in ACR must be accessible to affected employee. The Supreme Court developed the principles of natural justice.

39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

14. Natural justice includes right to represent against adverse remarks and seek review of the same.

> 40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

15. This is a landmark judgment by the Supreme Court which ended the slavery for ACR. Prior to this the Information Commissions gave different contradictory judgments regarding disclosability of ACRs under RTI Act. But this Supreme Court set the controversy at rest by ordering transparency with reference to ACRs. It is a great relief because of RTI Act and the wisdom of the Hon'ble Supreme Court in the above case, this British appendage system was removed and APAR system replaced it from 2008-09.

16. Government Employees online portal http://www.gconnect.in/orders-in-brief/acr-apar/annual-performance-appraisal-report-dopt-instructions.html, gave following frequently asked questions and answers on APAR:

a) Since when the entire remarks in the APAR is being conveyed to the officer reported upon for representation, if any? Answer — From the report for 2008-09 onwards.
b) On the basis of representation submitted for upgrading the grading in the ACR/APAR under OM dated 13.4.2010, can a review DPC be convened if the Competent Authority upgrades the grading to the benchmark level? Answer — The O.M. No. 21011/1/2010-Estt.A dated 13.4.2010 does not envisage any review DPC and it is concerned with future DPCs only to be held after the date of issue of the O.M.
c) What are the time schedules for completion of various processes in the APAR? Answer— Annexure—III to O.M. No. 21011/1/2005-Estt. (A) (Pt-II) dated 23rd July, 2009 refers. This O.M. is available in this Department's website. Source: http://persmin.gov.in

17. This is the most significant change in the functioning of pubic authorities brought by the vibrant employees challenging the adverse ACR remarks through RTI and PILs. However, the change will not be applicable before 2008 and will not help the appellant to secure any remedy for adverse remarks in ACR for years 2001 to 2004. All of those employees who were adversely remarked by their superiors might be at a serious disadvantage and injustice or differential treatment. There is no remedy available for such employees are still in service, or retired, if their old ACRs contain any adverse remarks and their career is

affected by it. The employees like this appellant, should check up with the websites of www.persmin.gov.in or www.gconnect.in giving useful information and clarifications required by them, before filing any RTI application or appeals.

18. The appellant as on today has a right to information about remarks in the ACR and to know the reasons for average/adverse remarks. The RTI Act does not provide any answer to such questions, for which a policy need to be formulated. The affected employees like appellant need to organize representation and the appropriate Government should consider the same. The Commission recommends both. The Commission holds that sufficient information is provided to the appellant, and hence this appeal is closed.

Sd/-

(M. Sridhar Acharyulu)
Central Information Commissioner

Authenticated true copy

(Dinesh Kumar)
Deputy Registrar

Addresses of the parties:

1. The CPIO under RTI,
   Kendriya Vidyalaya Sangathan, 18,
   Institutional Area, Shaheed Jeet Singh Marg,
   New Delhi-110016.

2. Shri Y. K. Mall,
   H. No. 177/4 RDSO, Colony Manak Nagar,
   Lucknow-226011.